



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Friends of the Waterfront, Inc.

File: B-225378

Date: January 6, 1987

DIGEST

Agency reasonably determined that firm was substantially owned or controlled by a government employee, and therefore ineligible for a contract award, where government employee was a co-founder of the corporation and signed the firm's bid as president, and the corporation's address is the employee's residence address.

DECISION

Friends of the Waterfront, Inc. (Waterfront), protests the rejection of the bid it submitted in response to invitation for bids (IFB) No. DACW31-86-B-0021, issued by the Army Corps of Engineers. Waterfront also protests that Lake Weed Cutting Service, the awardee under the IFB, is nonresponsive and submitted a nonresponsive bid. Since performance of the contract has been completed, Waterfront requests as relief reimbursement of its proposal preparation and bid protest costs.

We deny the protest in part and dismiss it in part, and we deny the claim.

The IFB, issued on April 28, 1986, requested bids to harvest hydrilla and exotic plants growing in the Potomac River. At the May 1 bid opening, the Army received six bids, with Waterfront being the low bidder, Allied Biological second low, and Lake Weed third low. The Army determined that Waterfront's bid was nonresponsive because the firm had conditioned its price, and that Allied's bid was nonresponsive because Allied had not bid on all line items. The Corps then conducted a preaward meeting with Lake Weed, inspected the firm's equipment, and awarded it the contract.

On June 13, Waterfront received notice that its bid was nonresponsive and that the contract had been awarded to Lake Weed. During a phone conversation the Corps also informed

Waterfront that pursuant to the Federal Acquisition Regulation (FAR), 48 C.F.R. § 3.601 (1985), the firm was ineligible to receive the award due to a conflict of interest. The Corps made this determination because Mr. Arnold, a federal government employee, signed the bid as president of the firm; Mr. Arnold's residence address was given as Waterfront's corporate address; Mr. Arnold was listed on the firm's Articles of Incorporation as the resident agent; and Mr. and Mrs. Arnold had founded Waterfront. In a protest to the Corps, Waterfront protested the nonresponsiveness and conflict of interest determinations, and also argued that the awardee was a nonresponsible firm and had submitted a non-responsive bid. The Corps denied the protest and this protest to our Office followed.

Waterfront asserts that no conflict of interest exists because Mr. Arnold no longer substantially owns or controls the corporation. In this regard, Waterfront points out that, following the contract award to Lake Weed, the corporate ownership of Waterfront was changed so that Mr. Arnold and another federal-employee stockholder now own only 15.2 percent of the stock. Waterfront further explains that neither Mr. Arnold nor any other government employee remains a corporate officer, and that Mr. Arnold was the only government employee on the Board of Directors at the time of award. -

The above-cited regulation prohibits a contract award to a government employee or to a business concern or other organization owned or substantially owned or controlled by one or more government employees except where the agency head finds that a compelling reason, such as the government's needs cannot otherwise reasonably be met, requires such an award. See FAR, 48 C.F.R. § 3.602. No such determination was made here. This regulation implements a policy that contract awards to federal employees are undesirable because they invite criticism and give rise to the appearance of favoritism or fraud. Cooley Container Corp., B-220801, Jan. 31, 1986, 86-1 C.P.D. ¶ 114. The policy is intended to avoid even the appearance of favoritism or preferential treatment by the government towards a firm competing for a government contract. Ernaco, Inc., B-218106, May 23, 1985, 85-1 C.P.D. ¶ 592. The responsibility for determining whether a firm competing for a contract should be denied an award pursuant to FAR, 48 C.F.R. § 3.601, rests primarily with the procuring agency, and we will not overturn the agency's determination if it has a reasonable basis. Id.

Here, Mr. Arnold was a co-founder of the corporation; Waterfront's corporate address was the same as Mr. Arnold's

residence address; and Mr. Arnold was president of the corporation and signed Waterfront's bid. We find that these facts clearly gave the Corps a reasonable basis to find that Mr. Arnold substantially owned or controlled the corporation and that a contract award to Waterfront therefore was prohibited. See Cooley Container Corp., B-220801, supra. Moreover, Waterfront's position that certain subsequent changes in the corporation eliminate any possible conflict and make Waterfront eligible for the award is irrelevant since it appears from the record that the changes were made only after the contract was awarded. An agency's determination as to the presence of an impermissible conflict necessarily must be based on facts that exist at the time the award is made. Electronics West, Inc., B-209720, July 26, 1983, 83-2 C.P.D. ¶ 127.

Since we find that the Corps properly determined that due to a conflict of interest Waterfront was ineligible to receive a contract award, we need not consider whether the firm's bid properly was rejected as nonresponsive. Further, because we find Waterfront would not be eligible for award in any case, Waterfront is not an interested party to protest that Lake Weed should not have received the award. Bid Protest Regulations, 4 C.F.R. §§ 21.0(a) and 21.1(a) (1986); LW Planning Group, B-215539, Nov. 14, 1984, 84-2 C.P.D. ¶ 531. Finally, since Waterfront's protest is without merit, Waterfront is not entitled to reimbursement of the costs it incurred in preparing its bid and in pursuing this protest. See Designware, Inc., B-221423, Feb. 20, 1986, 86-1 C.P.D. ¶ 181.

The protest is denied in part and dismissed in part. The claim for costs is denied.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel